BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOYCE A. WILLIAMS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,009,881
ONE BEACON INSURANCE	)	
Respondent	)	
AND	)	
	)	
ZURICH US INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the April 8, 2005, Award entered by Administrative Law Judge Steven J. Howard. The Board heard oral argument on September 27, 2005.

APPEARANCES

Michael R. Wallace of Shawnee Mission, Kansas, appeared for claimant. Jason J. Montgomery of Roeland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a February 21, 2003, accident, which injured claimant's right wrist. In the April 8, 2005, Award, Judge Howard concluded claimant's accident was compensable under the exceptions to the "going and coming" rule of K.S.A. 2002 Supp. 44-508(f). Persuaded by the opinions of the neutral medical examiner, Judge Howard determined claimant sustained a 20 percent functional impairment to her right upper extremity and, therefore, the Judge awarded claimant permanent disability benefits for that functional impairment.

Respondent and its insurance carrier contend Judge Howard erred. They argue claimant's accidental injury did not arise out of and in the course of her employment as claimant's accident allegedly did not occur on its premises but rather on property neither controlled nor maintained by respondent. Therefore, they maintain the premises exception to the "going and coming" rule does not apply. Further, respondent and its insurance carrier argue the elements of the special hazard exception to the "going and coming" rule were not met. In the alternative, should the Board determine claimant's accident is compensable under the Workers Compensation Act, respondent and its insurance carrier request the Board to adopt the opinions of claimant's treating physician, which would reduce claimant's award of permanent disability benefits to a nine percent functional impairment to the right upper extremity.

Conversely, claimant contends she sustained an accidental injury that arose out of and in the course of her employment with respondent and that she sustained a 20 percent functional impairment to the right upper extremity. Claimant argues both exceptions to the "going and coming" rule apply and were met. Further, claimant contends the neutral medical examiner's opinions regarding claimant's functional impairment are more objective and more accurate than those of the treating physician. Claimant requests the Board to affirm the Award.

The issues before the Board on this appeal are:

1. Did claimant's February 21, 2003, accident arise out of and in the course of her employment with respondent?

2. If so, what is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes that the April 8, 2005, Award should be modified to award claimant permanent disability benefits under K.S.A. 44-510d for a 20 percent functional impairment to the right upper extremity based upon a maximum of 200 weeks, rather than 210 weeks.

Respondent leased office space in a building located in Lenexa, Kansas. The terms of the lease provided that respondent pay a base rent plus its pro rata share, or 66.7 percent, of the operating expenses incurred by its landlord. And those operating expenses included the costs of repairing and maintaining the building's roadways, parkways, and driveways. The lease agreement also entitled respondent to its pro rata share of the parking spaces located on the south side of the building.

Claimant worked for respondent out of its Lenexa, Kansas, location. Claimant's testimony is uncontradicted that she was directed to park in a specific area of the parking lot that was adjacent to respondent's offices and that she was required to enter the office building through a certain door.

On February 21, 2003, while walking into the office building from the parking lot, claimant tripped on a crack in the asphalt or concrete and fell. Due to the accident, claimant fractured a bone in her right wrist.

The Workers Compensation Act provides, in part:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. . . .[1]

The Board concludes that the parking lot where claimant fell was part of respondent's premises as respondent had a right to utilize that lot pursuant to its lease. And any failure by the lessor to properly maintain that lot for respondent's use could conceivably be remedied by judicial intervention, if necessary. Furthermore, the lease itself required respondent to pay for two-thirds of its upkeep. Therefore, respondent had fiscal responsibilities for the parking lot in question. Considering all the facts, the Board concludes this claim is compensable under the Workers Compensation Act.

In addition, a second reason exists that makes this claim compensable. The fact that respondent required claimant to park in a designated area and enter the building through a designated door makes claimant's entry into the office building on that predetermined path an incident of her employment.

The Board is mindful of the recent *Rinke*[2] decision in which the Kansas Court of Appeals held that a worker who fell in a parking lot leased by her company was denied

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[1] K.S.A. 2002 Supp. 44-508(f).

[2] *Rinke v. Bank of America*, No. 93,868, ___ Kan. App. 2d ___ (Oct. 21, 2005) (This case is not final and may be subject to review or rehearing.).

workers compensation benefits as the parking lot was not deemed to be part of her company's premises. But the Board finds *Rinke* is distinguishable upon its facts.

In *Rinke*, the Kansas Court of Appeals held the employer did not have control over the parking lot. In the case at hand, however, respondent not only had rights under its lease to require that the lot was properly maintained but it was also financially responsible for the lot's upkeep and maintenance. In *Rinke*, the employees did not have parking stickers or designated parking spaces and they were not told where to park. But in the present case respondent provided claimant with a parking permit, told her where to park, and directed her to enter the building through a specific door. Accordingly, respondent exercised control that was absent in *Rinke*.

As the Kansas Court of Appeals noted in *Butera*,[3] the "going and coming" rule should be interpreted liberally to bring the parties within the provisions of the Workers Compensation Act.

> Under the liberal construction rule, this court is required to interpret K.S.A. 2001 Supp. 44-508(f) for the purpose of bringing Butera and Fluor Daniel within the provisions of the Act. Accordingly, we liberally construe the term "employer" as used in the premises and special hazard exceptions to the going and coming rule as encompassing the principal when an employee of a contractor is injured on the principal's premises or when the employee is injured while on a route not used by the public except in dealings with the principal. Such an interpretation not only follows the liberal construction rule but also furthers the primary purpose of the Act, which is to burden industry with the economic loss to a workman resulting from accidental injuries sustained in the course of his or her employment.[4]

As indicated above, the primary purpose of the Workers Compensation Act is to burden industry with the economic loss to workers who are injured due to their work. Liability under the Act should not be predicated upon whether an employer leased its premises as opposed to purchasing it. In addition to its rights under its lease, respondent asserted its authority and control over the parking lot by restricting parking and designating parking areas.

For the above reasons, the Board finds the parking lot was part of respondent's premises. Consequently, claimant's February 21, 2003, accident arose out of and in the course of her employment with respondent.

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[3] *Butera v. Fluor Daniel Constr. Corp.*, 31 Kan. App. 2d 108, 61 P.3d 95, *rev. denied* 275 Kan. 963 (2003).

[4] *Id.* at 114.

The Board affirms the Judge's finding that claimant sustained a 20 percent functional impairment to her right upper extremity. The Board agrees that Dr. Edward J. Prostic's opinions regarding claimant's permanent impairment are more persuasive than those of Dr. T. J. Rasmussen. Dr. Prostic, who was appointed by the Judge to provide an independent medical evaluation, suspected claimant had a torn triangular fibrocartilage complex in her wrist. Dr. Rasmussen admitted he concentrated on claimant's comminuted fracture and, therefore, was not aware if claimant had a tear in her cartilage complex. Dr. Rasmussen, however, indicated claimant had a prominence of her distal ulna, which can put pressure on the cartilage and cause a tear.

> Q. (Mr. Wallace) When you saw her in the office on May the 5th of 2004, you noted she had a prominence of the distal ulna. Could you tell us what that means?
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> A. (Dr. Rasmussen) Well, if you look at your own wrist, on the back of the wrist there's a little bump on one side. That's your distal ulna. When you break your bones in that area, it is not uncommon to get some relative change in position of those two bones, the radius and the ulna, and it can make the ulna more prominent.
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> Q. And so that bone would stick up more?
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> A. It would stick up more. We talked previously about triangular fibrocartilages. If that ulna is more prominent, you can put more pressure on the triangular fibrocartilage, and if you didn't tear it at the time of the original injury, that prominence could cause problems with your TFC or triangular fibrocartilage in the future.[5]

As indicated above, the Award should be corrected to base claimant's award upon a maximum of 200 weeks, rather than 210 weeks. Claimant injured her wrist, which entitles her to receive the benefits for an injury to the forearm. And under the schedule of K.S.A. 44-510d(a)(12), the maximum number of weeks for a forearm injury is 200 weeks.

AWARD

WHEREFORE, the Board modifies the April 8, 2005, Award entered by Judge Howard.

Joyce A. Williams is granted compensation from One Beacon Insurance and its insurance carrier for a February 21, 2003, accident and resulting disability. Ms. Williams is entitled to receive 16.57 weeks of temporary total disability benefits at $432 per week, or $7,158.24, plus 36.69 weeks of permanent partial disability benefits at $432 per week,

[5] Rasmussen Depo. at 17-18.

or $15,850.08, for a 20 percent permanent partial disability, making a total award of $23,008.32, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Jason J. Montgomery, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director